Commission's evaluation – necessity. The Commission has interpreted "necessary" to mean that "an element is a prerequisite for competition."[187]

Based upon the statute, the Commission may not require that loop spectrum be unbundled. Such unbundling is not "necessary," and the lack of access to a portion of the spectrum on a loop does not "impair" a CLEC's ability to provide advanced services, since they can simply obtain the entire loop (or a physical sub-loop, upon bona fide request) and make arrangements with other carriers to provide voice service. Thus, consistent with the statutory criteria of § 251(d)(2) and the purpose of the unbundling requirement, the Commission may not require ILECs to unbundle loop spectrum.

Third, even if the Commission were to conclude that loop spectrum is a network element meeting the § 251(d) criteria, there are operational and administrative issues that create significant obstacles. As the FCC recognized in the *Local Competition Order*, "allow[ing] simultaneous access to the loop facility would preclude the provision of certain services in favor of others. For example, carriers wishing to provide solely voice-grade service over a loop would preclude another carrier's provision of digital service, such as ISDN or ADSL, over that same loop."[188] In addition, the Commission has identified "crosstalk" as a technical constraint that can limit service performance.[189] Furthermore, there is no way to establish the practical point of demarcation for voice

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[187] *Local Competition Order*, ¶ 282

[188] *Id.*, ¶ 385.

[189] *NPRM*, ¶ 160. Crosstalk occurs when one pair of copper wires housed within a binder group generates noise in other pairs within that binder group through electromagnetic coupling. *Id.*

and non-voice spectrum. The responsible party for administering the loop for such items as trouble reporting and loop administration is divided. Likewise, there is bound to be confusion about which party must perform routine maintenance of the physical facility and how the costs of such maintenance are to be divided.

In light of the foregoing, the Commission should affirm its earlier conclusion and state that, if a competing provider purchases the loop as a UNE, it should be responsible for provisioning *all* of the services that its customer desires over that particular facility.[190] Such an arrangement places the responsibility for network management, service provisioning, and customer care with a single provider, thereby eliminating the difficulties of determining how to handle the frequency division multiplexing equipment. Moreover, as the Commission has stated, "[g]iving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new services to such end users."[191] Accordingly, GTE urges the Commission to conclude that CLECs purchasing an unbundled loop are responsible for providing voice and data services over that loop if its customer so desires. If the CLEC is not capable of or interested in providing voice service, it is free to negotiate with other carriers (including the ILEC) to take the voice traffic as a subcontractor to the CLEC. The Commission should not allow a carrier that

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[190] In the *Local Competition Order*, the Commission properly rejected requests to require the unbundling of loop spectrum. The Commission was not persuaded by the fact that a definition based on the types of traffic provided over a facility might allow for the separation of costs attributable to one end user. *Local Competition Order*, ¶ 385.

[191] *Id.*

purchases a loop to reallocate the responsibility of offering voice service to the CLEC's customers onto the incumbent simply because it does not wish to provide that service.

E. Uniform Standards For Attachment Of Electronic Equipment At The Central Office End Of A Loop Are Unnecessary and Counter-Productive. (¶ 163)

GTE objects to the Commission's proposal to adopt uniform national standards for attachment of electronic equipment (such as modems and multiplexers) at the central office end of a loop by incumbent LECs and new entrants.[192] It is common for an equipment manufacturer to develop a new technology using proprietary protocols, software, and interfaces. Simultaneously, another manufacturer may develop the same technology with similar, but non-compatible, protocols, software and interfaces. For example, each digital switch manufacturer had, at one time, proprietary interfaces for its direct interface remote terminals. This made it impossible for one manufacturer's remotes to be directly interfaced to another manufacturer's base unit switch.[193] With adoption of the industry's TR.303 interface standard, however, there is now full interoperability between all compliant remotes and base units. This example has been repeated numerous times with other telecommunications technologies, and the same move toward interoperability will happen again with regard to xDSL technology.[194]

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[192] *NPRM*, ¶ 163.

[193] A direct interface remote does not require a central office terminal ("COT") to demultiplex the traffic for delivery to individual line cards in the host switch. Such a remote connects to the switch at a DS-1 rate and the switch handles the demultiplexing.

[194] During the early deployment of xDSL, there will be numerous examples of proprietary interfaces where equipment manufactured by vendor A will not work with

(Continued...)

GTE therefore believes that dictating uniform specifications by regulatory fiat would be highly imprudent. Rather than trying to second-guess the direction of technology, the Commission should preserve the industry's flexibility to solve interoperability issues and develop consensus standards. The industry processes for doing so are open to all interested parties and scrupulously fair. Short-circuiting such processes by adopting uniform federal standards would risk freezing technology and mandating an inferior solution.[195]

F. The Current Definition Of The Local Loop Remains Appropriate. (¶ 164)

The *NPRM* asks commenters to discuss whether the current definition of the loop is sufficient to ensure that competitive LECs have access to the loop functionalities needed to offer advanced services.[196] There is absolutely no need to redefine the local loop. As discussed above, the Commission has defined a local loop to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS-1 level signals."[197] The definition

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(...Continued)
equipment manufactured by vendor B. For this reason, CLECs must disclose what equipment will be on the loop, and ILECs must qualify the equipment or service to assure that it will not harm existing services.

[195] In addition, to the extent standards for attachment of equipment in the central office fall within the definition of "public telecommunications network interconnectivity," the Commission's role is limited to participating in industry processes; it cannot bypass those processes. *See* 47 U.S.C. § 256(b)(2).

[196] *NPRM*, ¶ 164.

[197] *Local Competition Order*, ¶ 380.

established in the *Local Competition* proceeding remains appropriate in the context of advanced services and need not be modified. Further, the record established so far in all of the proceedings associated with § 706 shows that the existing framework is working. GTE and other ILECs have provided and will continue to provide access to unbundled xDSL-conditioned loops to requesting carriers in accordance with the Commission's existing rules, including the definition of the local loop.

G. The Commission's Proposed Rules Regarding Access To Unbundled Loops Are Overbroad And Raise Serious Technical Issues. (¶¶ 167-177)

Unbundling DLC-Delivered Loops: In its *Local Competition Order*, the Commission concluded that it was "technically feasible" to unbundle loops that pass through an integrated digital loop carrier ("DLC") or similar remote concentration device, and required ILECs to unbundle such loops for competing providers.[198] The Commission affirmed this obligation in the *MO&O*[199] and is now seeking comment on a wide range of issues regarding the unbundling of DLC-delivered loops. For example, the *NPRM* asks parties to address the technical issues that may arise when local loops pass through DLCs or similar remote concentration devices. In addition, the *NPRM* asks commenters to propose methods of unbundling loops passing through remote

[198] *Id.*, ¶¶ 383-384.

[199] *See MO&O*, ¶¶ 52, 54.

concentration devices, including identifying the benefits and drawbacks of any proposed method.[200]

There are complex technical, administrative, and operational issues related to unbundling loops at a DLC. With dozens of different types of DLCs and switch remote units throughout GTE's network, the complexity of administering mandated unbundling of such devices in any technically feasible manner is astronomical. These devices were designed to function and be administered in a single LEC environment. To mandate unbundling via any "technically feasible" method will create chaos.[201]

The DLCs that exist in GTE's network today simply cannot accommodate the kinds of advanced services being introduced today. These first generation DLCs, which were initially deployed contemporaneously with the implementation of digital switching systems, were not constructed with today's advanced services in mind. GTE is not offering ADSL through DLC's today because equipment is not available to support the service in a cost-effective manner. Technological solutions are being discussed and may be available at some point in the future, although cost-effectiveness remains an

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[200] *NPRM*, ¶ 170.

[201] *See* Affidavit of Stephen L. Schroeder (Appendix 3 hereto). For example, how would the CLEC note to the ILEC that a uniquely different UNE is associated with the local service request being processed? Who keeps track of the inventory with these uniquely different UNEs for each CLEC? What happens when the CLEC initiates a local service request calling for the application of a particular configuration and (a) the specified configuration either does not exist or is not available at the specified DLC location; or (b) there is no more capacity associated with the specified UNE configuration? GTE opposes the unrestricted unbundling of DLC-delivered loops via any "technically feasible" method, just as it opposes the unbundling of copper loops at any splice point.

open issue. Notably, these solutions may not involve the DLCs that are in the network today, but may require deployment of new devices.[202] The Commission should not adopt rules that anticipate solutions that do not currently exist.

GTE faces a number of other constraints that make the unbundling of loops passing through remote concentration devices technically infeasible. Comments in the ALTS proceeding confirm that the ability to extend xDSL services through pair gain facilities, such as DLCs, will necessitate the incorporation of so-called "mid-loop" electronics at the pair gain location.[203] However, this technology is not being deployed in GTE's initial introduction of ADSL service. GTE is offering a clean copper loop without any intermediate electronics attached to it. Nonetheless, GTE would entertain the possibility of offering an "extended" ADSL service, complete with mid-loop electronics, and would offer this configuration through its special access tariff at a price that incorporates the additional investment.

Obligation to Offer Any Technical Feasibile Method of Unbundling DLC-Delivered Loops: GTE disagrees with the Commission's conclusion that "the competitive LEC may request any 'technically feasible' method of unbundling the DLC-delivered loop,

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[202] Newer generation DLCs (sometime referred to as 3rd generation DLCs), which integrate broadband and narrowband services into the same platform, are not forecasted to be commercially available until the 1999 – 2000 time frame. Until then, broadband capability will only be available via adjunct devices. In addition, DLC devices which offer integrated broadband and narrowband capabilities will do so at a loss of overall POTS line card density. For example, one vendor offers a standard line card with six (6) lines per card, where the integrated broadband/narrowband line card accommodates just two (2) lines per card, a 67% reduction of line card density.

[203] *See, e.g.*, Comments of U S WEST, CC Docket No. 98-78, at 31-32 (filed June 18, 1998).

and that the incumbent LEC is obligated to provide the particular method requested."[204] While the 1996 Act requires ILECs to unbundle at any "technically feasible" point, it does not require ILECs to use any technically feasible method. As long as the unbundled DLC-loop has all of the features, functions, and capabilities to allow the provision of advanced services, there is no reason to allow the CLEC to dictate the method of unbundling.

Moreover, for reasons of network management and reliability, it is crucial that the ILEC be allowed to unbundle a DLC-loop, or any loop for that matter, in a manner that poses the least risk to the operation of the network. Service integrity is of paramount concern. Incumbents should not be required to compromise network reliability simply to satisfy an unbundling request that can be accomplished by other means. In addition, requiring incumbents to fulfill any and all types of unbundling requests would place significant burdens on ILECs. Each specialized method of unbundling would require its own specific equipment, personnel training, and network testing. This approach not only imposes unnecessary burdens and costs on ILECs but also leads to inefficiencies.[205] Thus, to ensure network integrity and avoid the undue burdens associated with multiple unbundling methods, the Commission should state that an

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[204] *NPRM*, ¶ 171.

[205] While CLECs, of course, must pay the costs engendered by their unbundling requests, ILECs still bear the risk that their expenditures on meeting such requests will not be recovered. In general, CLECs may obtain network elements without being subject to particular term commitments. As a result, if a CLEC loses a customer served by an unbundled loop, for example, it simply discontinues its use of that loop, leaving the ILEC to bear any unrecovered unbundling costs.

incumbent has satisfied its § 251(c)(3) obligation when it provides an unbundled conditioned loop, regardless of the method used to achieve the unbundling.

Nondiscriminatory Access to xDSL-Compatible Loops: The Commission tentatively concludes that ILECs "must make available, in a nondiscriminatory manner, to competitive LECs the same methods that the [ILEC] (or its advanced services affiliate) uses itself to provide advanced telecommunications capability such as xDSL-based services."[206] For example, "if the [ILEC] (or its advanced services affiliate) provides xDSL-based services through the use of a DSLAM at the remote terminal, the [CLEC] must be able to avail itself of that option, either through the use of the [ILEC's] DSLAM or its own DSLAM collocated at the remote terminal.[207]

GTE disagrees that CLECs must be given access to loop/DSLAM combinations, if that is what the Commission is proposing. To the extent that the Commission has determined that xDSL equipment (*e.g.*, DSLAMs) are network elements that must be unbundled at any technically feasible point,[208] the classification of an xDSL loop, with mid-loop electronics, as a UNE clearly violates the *Iowa Utilities Board* decision.[209] Specifically, the court held that the FCC could not require ILECs to recombine network elements that were purchased on an unbundled basis. If a copper pair from the customer premise to the DLC is unbundled as an element, and the DSLAM at the DLC

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[206] *NPRM*, ¶ 172.

[207] *Id.*

[208] *MO&O*, ¶ 57. GTE believes this conclusion is wrong as a matter of law.

[209] 120 F.3d at 813.

is unbundled as an element, the provision of the combination is unquestionably a platform of UNEs. ILECs may choose to provide such platforms but certainly cannot be required to do so.

Deployment Intervals: The Commission tentatively concludes that deployment intervals for provisioning xDSL-compatible loops should be the same for ILECs and CLECs, regardless of whether the loop passes through a remote concentration device.[210] The Commission also asks whether it should require ILECs to provision xDSL-compatible loops within a specified interval, and, if so, what that interval should be.[211]

GTE opposes the adoption of any prescribed standard intervals. Incumbent LECs and competing carriers currently negotiate deployment and provisioning intervals during the interconnection agreement process. The intervals for provisioning xDSL-compatible UNE loops to requesting providers should be consistent with those negotiated agreements. Thus, rather than mandating uniform intervals, the Commission should leave such standards to voluntary, private negotiations backed up by state mediation or arbitration, as Congress intended.

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[210] *NPRM*, ¶ 172.

[211] *Id.*

H. The Commission's Proposed Rules Regarding Sub-Loop Unbundling Are Overly Intrusive And Unnecessary. (¶¶ 173-176)

The Commission tentatively concludes that ILECs must provide sub-loop unbundling and permit CLECs to collocate at remote terminals, unless the ILEC can demonstrate one of the following with respect to the particular remote terminal requested by the CLEC: (1) sub-loop unbundling is not "technically feasible;" or (2) there is insufficient space at the remote terminal to accommodate the requesting carrier.[212] The Commission also seeks comment on whether sub-loop unbundling and remote terminal access are, in fact, necessary for CLECs to provide high bandwidth services, such as xDSL-based services.[213] These proposals are imprudent and raise serious technical and network integrity issues.

Sub-Loop Unbundling: The Commission should not adopt a new policy of requiring sub-loop unbundling. The practical ramifications of sub-loop unbundling on network reliability and service integrity have not changed since the Commission refused to require ILECs to unbundle sub-loop elements in the *Local Competition* proceeding.[214] As GTE explained in its comments in that proceeding, sub-loop unbundling raises

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[212] *NPRM*, ¶ 174.

[213] *NPRM*, ¶ 174.

[214] *Local Competition Order*, ¶ 391.

complex technical, administrative, and operational issues.[215] These obstacles remain today.

In the *Local Competition Order*, the Commission concluded that sub-loop unbundling should be addressed by the states on a case-by-case basis.[216] There is no reason to deviate from this approach now. With literally dozens of different loop configurations (each with a distinct combination of network elements and technologies), access at the sub-network element level should be driven by demand by those carriers willing to compensate the ILECs for the required work; handled through negotiations; and not be deemed feasible until examined in the context of a specific use. CLECs may submit a bona fide request ("BFR") for sub-loop unbundling, and incumbent LECs should be allowed to evaluate these requests on a case-by-case basis. This case-specific approach is a realistic alternative; GTE already has 172 interconnection agreements that provide for sub-loop unbundling upon bona fide request.

Collocation at the Remote Terminal: GTE also objects to collocation at DLCs. Many first generation DLCs do not have any spare space within the cabinets. Most DLCs have a single access to the equipment bays, with some having a second access

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[215] GTE Comments, CC Docket 96-98, at 32-37 and Att. 1. Moreover, Congress did not express an intention to require ILECs to disaggregate their loops into piece parts. To the contrary, Congress only required the unbundling of entire loops. The Conference Report, for example, states that the term "network elements" is meant to include "local loops," H.R. Rep. No. 104-458, at 16 (1996), and the competitive checklist in Section 271 requires only that "local loop transmission from the central office to the customer's premises" be "unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv).

[216] *Local Competition Order*, ¶ 391.

to the cross-connect block. Network security and service integrity would be severely compromised if unfettered access to the equipment bays in DLCs were permitted.

Many, if not all, DLCs are deployed with a full complement of plug-in cards so as to reduce installation expense and subsequent visits due to growth. It would be expensive and inefficient to require ILECs to remove already installed equipment to make room for collocation equipment. Additionally, normal service order activity (installation and removal of services) causes the physical location of each service to be spread across all the plug-ins at the DLC. Consequently, it is unlikely that the equipment will be arranged in a manner that provides a dedicated shelf for the collocated equipment. If a collocator were to demand a dedicated shelf, the ILEC would have to physically rearrange many services to accommodate the request.

The *NPRM* asks for suggestions on what should be done if more CLECs request access to a remote terminal than the remote terminal can accommodate; proposed alternatives include a lottery system; auctions; or making the space available on a "first come, first served" basis.[217] If access at these locations is mandated, GTE supports a "first come, first served" policy. However, contrary to the Commission's tentative conclusion, if the ILEC's affiliate requests space first, the ILEC should not be required to deny the request simply because the requesting carrier is affiliated with the incumbent and space is limited. The separate affiliate requirement is intended to result in the affiliate being treated identically to a CLEC. Stripping the affiliate of rights afforded to every other CLEC would be inequitable and discriminatory.

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[217] *NPRM*, ¶ 175.

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Two years ago, the Commission established rules that required incumbents to allow competing carriers access to the local loop to promote competition in the local exchange market and to support advanced services. GTE and other ILECs have fully complied with the existing local loop rules, and there is no basis for concluding that even more intrusive requirements are needed. The best way to encourage the rapid deployment of advanced telecommunications services, as intended by Congress, is to refrain from adopting additional, detailed, unduly burdensome local loop rules.

V. THE COMMISSION'S PROPOSED UNBUNDLING REQUIREMENTS ARE INCONSISTENT WITH THE ACT, COURT PRECEDENT, AND THE PUBLIC INTEREST. (¶¶ 180-184)

In the *MO&O*, the Commission concludes that "all equipment and facilities used in the provision of advanced services are 'network elements'" subject to the obligations in § 251(c).[218] This obligation requires ILECs to provide new entrants with unbundled loops capable of transporting high-speed digital signals and, to the extent technically feasible, unbundled access to the equipment used in the provision of advanced services.[219] Parties are asked to identify the specific network elements that ILECs should be required to unbundle pursuant to § 251(c)(3).[220] In particular, the *NPRM* asks commenters to discuss the applicability of § 251(d), namely: (1) the extent to which

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[218] *MO&O*, ¶ 57.

[219] *Id.*, ¶¶ 11, 18.

[220] *NPRM*, ¶ 180.

particular network elements are "proprietary;" and (2) the extent to which a carrier would be "impair[ed]" in its ability to offer advanced services without unbundled access to a particular network element.[221]

Analysis under § 251(d)(2) demonstrates that the only network element that an ILEC must offer on an unbundled basis for the provision of advanced services is an xDSL-conditioned loop – and even this obligation should phase out with the rapid growth of competitive alternatives.[222] As discussed above in Section IV, this statutory provision establishes a minimum set of criteria for determining those network elements that must be made available on an unbundled basis, if technically feasible. The Commission must consider: (1) whether access to proprietary network elements is necessary; and (2) whether the failure to provide access to a particular network elements would impair the ability of the requesting carrier to provide the services that it seeks to offer.[223]

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[221] *Id.*

[222] As an initial matter, GTE supports NTIA's proposal that the Commission find Section 251(c) to be fully implemented with respect to xDSL services when ILECs "give competitors access to . . . loop facilities capable of supporting DSL services and collocation space on [incumbent] LEC premises." *See* Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, CC Docket Nos. 98-91, 98-26, and 98-11, at 8 n.23 (filed July 17, 1998); *see also NPRM*, ¶ 183. In fact, GTE and other ILECs have held this very position since the first Section 706 petition was filed by Bell Atlantic. The Commission need go no further than NTIA's suggestion. Accordingly, an ILEC that provides an xDSL-conditioned loop to a requesting carrier should be deemed to have fulfilled its § 251(c)(3) unbundling obligation.

[223] 47 U.S.C. § 251(d)(2)

Application of these statutory criteria to advanced services reveals that the only network element that ILECs must provide to enable competing carriers to provide xDSL services is the conditioned loop, not the electronics that attach to the loop. The loop currently is "necessary" (for at least some customers in some areas) because access to this allegedly "bottleneck" facility[224] can only be obtained through the ILEC. In such circumstances, failure to provide access to the loop would "impair" the ability of a CLEC to offer advanced services.

In contrast, the electronics that make the copper loop xDSL-functional (*e.g.*, a DSLAM) do not meet the statutory criteria of a network element subject to Section 251(c)(3) unbundling requirements. First, although the loop electronics are "necessary" to offer advanced services, an ILEC's failure to provide access to its electronics would in no way "impair" the ability of the CLEC to offer advanced services. Such equipment can be obtained through a variety of sources. The market for xDSL and other broadband equipment is quite competitive. The widespread availability of these electronics makes the barriers for entry into the advanced services market quite low.

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[224] Local loops are ceasing to be even arguably bottleneck facilities for customers in many locations. For example, in every medium-sized to large city served by GTE, at least one CLEC (and in some cases several) has constructed fiber facilities connecting to many businesses. Over time, these facilities will reach even more customers and be extended to less populated areas. CLECs also are building fiber to residential developments, cable companies are offering voice over coax or hybrid fiber/coax systems, and LMDS providers are beginning to compete in the local exchange market. (In this regard, Covad has just filed an SEC registration statement announcing plans to build networks capable of serving more than 28 million homes and businesses in 28 of the top 50 MSAs.) Each of these entities bypasses the ILEC loop entirely. Under such circumstances, there is no basis for continuing to subject ILECs alone to unbundling requirements for their loops. *See GTE NOI Comments.*

As several carriers recently pointed out in their comments on the BOC 706 Petitions, competitors need only a conditioned loop from the ILEC and collocation in order to provide a competitive xDSL service offering.[225] Once they have access to the conditioned loop, competitors are free to place the same, similar, or different electronics on the loop to provide their own advanced data service. Thus, ILEC provision of xDSL electronics is hardly a "prerequisite for competition."[226] Permitting access to every single network facility that an ILEC deploys ignores any meaningful distinction between facilities that may arguably be bottlenecks for now (such as conditioned loops) and those that competing carriers can obtain from many other competitive sources. This is not what Congress intended and not what the Act dictates.

As § 251(d)(2) makes clear, the unbundling mandate was not meant to require ILECs to hand over all of their innovative offerings and capabilities to competitors. There are appropriate limitations. As Commissioner Tristani points out, although "Congress wisely intended to give competitors a right to lease pieceparts from the incumbent to provide competing service. . . . Congress did so with an awareness that unbundling rights have limits."[227] These limits are whether a network element is

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[225] *See, e.g.,* Bell Atlantic Reply Comments, Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket Nos. 98-11, 98-26, 98-32, at 23 (filed May 6, 1998); Comments of the Competition Policy Institute, CC Docket Nos. 98-11, 98-26, 98-32, at 10 (filed April 6, 1998).

[226] *Local Competition Order*, ¶ 137

[227] Remarks of Commissioner Gloria Tristani before the U S WEST Regional Oversight Committee (April 27, 1998).

"necessary" and whether a lack of access will "impair" a requesting carrier's provision of service. According to Congress, "unbundling is necessary to enable competitors to purchase only the network elements they need."[228] In addition, the Commission has interpreted "necessary" to mean that "an element is a prerequisite for competition."[229]

If the Commission nonetheless concludes that ILECs must offer DSLAMs and other xDSL electronics as UNEs, it should establish reasonable limitations on this obligation. For example, if DSLAMs are deemed subject to the § 251(c)(3) unbundling requirement, incumbents should be required to offer DSLAMs as UNEs only in the those central offices where the incumbent is deploying advanced services. Mandating that an ILEC purchase and install equipment that the incumbent itself does not plan to use essentially places the incumbent in the role of constructing networks for its competitors, contrary to the Act's prohibition on compelling ILECs to provide better service to competitors than they provide to their own customers.[230]

Such an outcome is inconsistent with both Congress's intent and the holding in *Iowa Utilities Board*. First, under the 1996 Act, an ILEC must has a duty to provide nondiscriminatory access to the facilities and equipment that are part of its existing network; the incumbent is not bound to invest in unplanned modifications to its network

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[228] National Communications Infrastructure and Information Infrastructure Act of 1994,., H.R. Rep. No. 103-560, at 43 (1994).

[229] *Local Competition Order*, ¶ 137

[230] *Iowa Utilities Board*, 120 F.3d at 812-813.

solely to provide CLECs with equipment that the incumbent does not even use for itself. The Eighth Circuit expressly held as follows:

> [S]ubsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to the network elements upon demand. . .
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> . . . .
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> . . . The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier.[231]

Thus, the Commission is prohibited from imposing "superior quality" obligations on ILECs. Where GTE's ILEC does not install a DSLAM to provide its own advanced services, it cannot be required to purchase and install such equipment solely for the benefit of a requesting carrier.

Excessive unbundling requirements also are a direct threat to the goals of § 706. Encumbering ILECs with the additional obligation of providing loops equipped with xDSL electronics to competitors will have a chilling effect on investment and innovation. Consumers will be the ultimate losers. Intrusive unbundling obligations, like those proposed by the Commission, will severely distort carriers' incentives to invest in infrastructure development and the deployment of advanced telecommunications capabilities. Commissioner Tristani recognized this all too real danger: "[i]n the rush to unbundle networks, . . . we need to carefully consider the effect of unbundling on the

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[231] *Id.*

incumbent's incentives to motivate and deploy new technologies . . ."[232] Commissioner Powell also acknowledged the importance of protecting and encouraging incentives and innovation. As he noted, one fundamental way to encourage innovation is by "[g]ranting greater proprietary rewards to the innovator, allowing him to exclude others from his creation or expression for some period of time, as in the intellectual property context."[233]

This reduced incentive to innovate is not limited to ILECs. If competitors are allowed to access the investments and innovations of GTE and other ILECs at hypothetical forward-looking cost, they will have less incentive to develop their own new and creative offerings of advanced services. The end result is a profound disincentive to invest in facilities-based competition.

It is clear that CLECs are moving forward in the absence of the additional regulatory restrictions proposed by the Commission. As ALTS recently pointed out:

> CLECs were the first to introduce fiber ring networks and synchronous optical network ("SONET")-based services, and are at the forefront in deploying new digital subscriber line ("xDSL") technologies. . . . CLECs have risked enormous amounts of capital, and supported CLEC efforts to deploy these advanced services in hundreds of markets in only a few years' time.[234]

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[232] Remarks of Commissioner Gloria Tristani before the US WEST Regional Oversight Committee (April 27, 1998).

[233] Speech of Commissioner Michael K. Powell before the Legg Mason Investor Workshop, "Technology and Regulatory Thinking – Albert Einstein's Warning" (March 13, 1998).

[234] ALTS Petition at 4.

ALTS also states that "CLECs are aggressively providing digital services throughout the nation using XDSL and other technologies."[235] ALTS's own declarations illustrate that competition and innovation are flourishing in the advanced telecommunications market. There is simply no need to add more regulations when the intent of the 1996 Act is to promote a "pro-competitive, deregulatory environment."

VI. THE COMMISSION SHOULD NOT COMPEL ILECS TO OFFER ADVANCED SERVICES AT WHOLESALE RATES. (¶¶ 187-189)

In the *MO&O*, the Commission concluded that ILECs must offer for resale at a discount any advanced services that they generally offer to subscribers that are not telecommunications carriers.[236] The *NPRM* seeks comment on the applicability of Section 251(c)(4) to advanced services to the extent that such services are exchange access services.[237] The Commission tentatively concludes that advanced services marketed by ILECs generally to residential and business users or to Internet service providers should be deemed subject to the Section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access.[238]

GTE objects to the application of the wholesale discount requirement to an ILEC's advanced services, whether those services are considered exchange, exchange

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[235] *Id.* at 9.

[236] *MO&O*, ¶ 61.

[237] *NPRM*, ¶ 188.

[238] *NPRM*, ¶ 189.

access, or some other form of telecommunications service.[239] The 1996 Act requires an ILEC to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[240] Thus, in order to be subject to the § 251(c)(4) resale obligation, a telecommunications service must be both: (1) provided "at retail;" and (2) provided "to subscribers who are not telecommunications carriers."[241]

Advanced services do not meet either criterion. First, these services (to the extent they are telecommunications services) are not offered "at retail." In determining if a service is offered "at retail," the Commission must look at the intended use of the service. If the service is purchased as an integral production input to the service that ultimately will be offered to an end user subscriber, it is a wholesale product and thus not subject to discounted resale. xDSL services clearly fall into this category of wholesale services. Typically, xDSL services are purchased by information service providers – and, in many cases, by CLECs or IXCs, which are telecommunications carriers – so that they can offer high-speed access as part of their end-to-end Internet service. Thus, because the access capability is simply an input into a much larger Internet service, this capability is not being offered "at retail."

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[239] The Commission is plainly wrong in declaring that all advanced services are telecommunications services. Some advanced services are information services and therefore not subject to resale at all, let alone discounted resale.

[240] 47 U.S.C. § 251(c)(4)(A).

[241] *Id.*

Second, contrary to the Commission's conclusion,[242] many or most advanced services likely will not be provided predominantly to "subscribers who are not telecommunications carriers." The Commission cannot decide, before the fact, that all advanced services now and in the future will be provided principally to non-telecommunications carriers. Advanced services can be used to provide a wide range of service offerings, including high-speed access to the Internet as well as IP telephony.[243] The Commission's sweeping conclusion that advanced services, many of which do not even yet exist, will be provided only to non-telecommunications carriers is wholly unsubstantiated.

Even if the Commission determines that the resale discount requirement of § 251(c)(4) may theoretically apply to some advanced services, it should nevertheless forbear from enforcing this requirement.[244] Forbearance is authorized because the requirements of § 251(c)(4) "have been fully implemented." GTE already makes available all of its retail telecommunications services for resale on a nondiscriminatory

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[242] *NPRM*, ¶ 188 ("We expect that advanced services will be offered predominantly to ordinary residential or business users or to Internet service providers. None of these purchasers are telecommunications carriers.").

[243] *See Report to Congress, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67 (rel. Apr. 10, 1998).

[244] Section 10 of the 1996 Act requires the Commission to forbear from applying any statutory provision if the agency determines that: (1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest 47 U.S.C. § 160(a).

basis.[245] Moreover, the three criteria of § 10 are satisfied. First, continued enforcement of the resale discount requirement is unnecessary to ensure that the rates of advanced services are just and reasonable. Second, forbearance from imposing the resale discount obligation on ILECs would not harm consumers. To the contrary, consumers would reap significant benefits from reduced regulation as competitive market forces would help bring the rapid deployment of advanced services to the public.

Finally, public policy favors forbearance from requiring ILECs to offer advanced services at a wholesale discount. The FCC's proposal would force ILECs to give competitors significant cost breaks for non-bottleneck facilities, thereby inhibiting investment and innovation for incumbents and competitors alike. Why would an ILEC invest the time, capital, and other resources to develop new service offerings, if it must turn around and offer them to CLECs at fire sale prices? Furthermore, why would a CLEC invest in research and development and expend resources on creating new advanced telecommunications products and services, if it can buy them at artificially low rates from ILECs?

Interconnection, unbundling, discounted resale – all of these statutory obligations are being met by GTE and other ILECs pursuant to negotiated and arbitrated interconnection agreements. In fact, ILECs have negotiated more than 1000 interconnection agreements.[246] Accordingly, if the Commission determines that the

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[245] *See* 47 U.S.C. § 160(d) ("the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.").

[246] *See* The Need for Carrier Access Pricing Flexibility in Light of Recent Marketplace

(Continued...)

resale discount requirement applies to advanced services, GTE urges it to forbear. Forbearance will avoid adding yet another layer of unwarranted regulation that threatens to slow the deployment of advanced services, contrary to the goals of § 706.

VII. CONCLUSION

As the Commission properly recognizes, the advanced services marketplace is competitive today. Cable television MSOs, terrestrial wireless carriers, satellite service providers, long distance carriers, fiber-based CLECs, and ILECs all vie to provide high-speed Internet access and other broadband services to consumers throughout the country. Notably, many of these competitors are completely independent of the ILECs' networks; they have their own loops, their own switches, their own transport facilities, and their own network intelligence – and, in many cases, they need not even interconnect with the ILEC to provide advanced services.

Given this robust competition, and the lack of ILEC control over any essential inputs into advanced services, GTE commends the Commission for proposing an "optional alternative pathway" under which an ILEC's parent can create an advanced service subsidiary that will be free of incumbent carrier regulation and treated as non-dominant. Such parity of regulation with the very largest cable MSOs and global, vertically integrated competitors such as AT&T, MCI WorldCom, and Sprint, is essential

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Developments, Richard Schmalensee and William Taylor, National Economic Research Associates, *Ex Parte* (filed Jan. 16, 1998) (citing USTA statistic that, as of July 1, 1997, there were 1,231 interconnection agreements).